Supreme Court, U.S.
FILED
10-757 SEP 21 2010
OFFICE OF THE CLERK

No. __-____

In The
Supreme Court of the United States

MICHAEL NEWDOW, *ET AL.*,
Petitioners,

v.

JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred by ruling that there is no redressability when a plaintiff's rights are abridged by individuals carrying out the President's wishes?

LIST OF ALL PARTIES

(1) Plaintiffs

(a) Individuals

(1) Newdow, Michael
(2) Schempp, Ellery
(3) Lipman, Mel
(4) Barker, Dan
(5) Gaylor, Annie-Laurie
(6) Sherman, Robert
(7) Berkshire, August
(8) Castle, Marie
(9) Bechman, Stuart
(10) Silverman, Herb
(11) Torpy, Jason
(12) Greenberger, Harry
(13) Hornbeck, Kirk
(14) Wingrove, Richard
(15) Arntzen, Christopher
(16) Stoltenberg, John
(17) LaClair, Katherine
(18) Altman, Louis
(19) Case, Paul
(20) Schiffelbein, Jerry
(21) Richardson, Anne
(22) Richardson, Jay
(23) Dugan, Dan
(24) Andrews, Anna Mae
(25) Sutton, Eliza
(26) Ressman, Richard
(27) Abelman, Marsha W.

(28) A-Doe1[1]
(29) Aldred, Stephen
(30) A-Doe2
(31) Allewalt, Linda
(32) Alman, Isadora
(33) A-Doe3
(34) Avery, Timothy G.
(35) Balzano, Donald P.
(36) B-Doe1Parent1
(37) Barnes, Chad
(38) B-Doe2
(39) Beat, Lawrence W.
(40) Becker, Zachary
(41) Beekhuis, G. J.
(42) Benedict, Marc J.
(43) B-Doe3
(44) Berger, Gary Lee
(45) Berry, James H.
(46) B-Doe4
(47) Blazo, Al
(48) Borrell, Lorraine A.
(49) Borrell, Richard M.
(50) Bossom, Chris
(51) Brabander, Gregory T.
(52) Brandt, Marle
(53) Braun, Burkhard R.
(54) B-Doe5

[1] On May 14, 2009, Plaintiffs filed in the Court of Appeals an unopposed Motion for Leave to Submit Child-Identifying Information Under Seal. (#1180977). This motion was granted on July 10, 2009. (#1195744). Pursuant to the instructions provided by the Clerk's Office in a phone call on September 16, 2010, the names of the parties covered by that motion are being submitted (under seal) in an envelope accompanying this Petition.

(55) B-Doe6
(56) B-Doe7
(57) B-Doe8
(58) B-Doe1Parent2
(59) B-Doe1Child1
(60) B-Doe1Child2
(61) Burke, Julianne F.
(62) Burke, Michael
(63) Butcher, Linda
(64) Cassels, Jean
(65) C-Doe1
(66) C-Doe2
(67) C-Doe3
(68) Cox, Christopher
(69) Cramer, Sally J.
(70) C-Doe4
(71) Crow, Gail M.
(72) Dabbs, Edward J.
(73) Darwin, Steven P.
(74) Davidson, Joseph
(75) Davis Jr., Herbert A.
(76) Destler, David M.
(77) D-Doe1
(78) E-Doe1
(79) Eisenberg, Bernard
(80) Ellis, Brian P.
(81) Farren, Jamie L.
(82) Fleming, David J.
(83) Floyd, Lauren
(84) Gahagan, Gary
(85) Garvin, Jonathan
(86) Ghermann, Ernst F.
(87) Gilthorpe, Stefan
(88) Gleason, Bruce

(89) Goodman, Joseph P.
(90) Grimaudo, Leonard T.
(91) Grimes, Richard O.
(92) Guardino, Beverly J.
(93) Guillen, Gary A.
(94) Gulledge, Christopher J.
(95) Gulsby Sr., John A.
(96) Guzman, Louis E.
(97) Haider, William R.
(98) Halasz, Richard
(99) Haley, Jeffrey T.
(100) Hall, William J.
(101) Hamel, David O.
(102) Hart, Diane
(103) Hart, Brian
(104) Hawkins, Gary D.
(105) H-Doe1
(106) Heard, Gloria J.
(107) Hecker, Walter G.
(108) Helton, Robert S.
(109) Hoaks, Trina J.
(110) Holste, Peter N.
(111) Hommerding, Emily
(112) Honnigford, Bruce N.
(113) Hughes, Wendy
(114) Humston, Jill L.
(115) Hunn Jr., Wilfred A.
(116) Hunsberger, Virginia M.
(117) Huntsman, David P.
(118) Jacobson, Michael
(119) Jochums Jr., Robert E.
(120) Johnson, Troy P.
(121) Jones, Linda W.
(122) J-Doe1

(123) Jones, Ronald A.
(124) Kane, George F.
(125) Kaplan, Wendy
(126) Kessinger, M.D., Rovena L.
(127) Kirby, Susan L.
(128) Knox, Donna J.
(129) K-Doe1
(130) Koch, Don
(131) Kottow, Travis
(132) LaCourt, Marilyn
(133) L-Doe1
(134) Lapinsky, ZoAnn
(135) Last, Eric R.
(136) Leach, Christopher
(137) Lerner, Lawrence S.
(138) Leung, Carol
(139) Leung, Granville
(140) Lewis, Gerald J.
(141) Li, June H.
(142) Lieb, Anne-Rosemarie
(143) L-Doe2
(144) Lipp, Dallas W.
(145) Lobdell, James E.
(146) Lubin, Donald P.
(147) Mack, Anthony
(148) Mack, Jillian
(149) Mack, Susan
(150) Mansker III, Andrew J.
(151) Marchetti, Peter
(152) Marquis, Victor O.
(153) Marquisee, Eleanor
(154) Marquisee, Mark
(155) Martin, Richard M.
(156) Mauriello, David

(157) Maxwell, Sarah A.
(158) McCollum, James T.
(159) McCormick, Andrea H.
(160) M-Doe1Parent1
(161) M-Doe1Parent2
(162) Mitteldorf, Harriet
(163) Monllor, Javier
(164) Monroe, Phillip
(165) M-Doe2
(166) Morgan, Thomas J.
(167) Morris, Garrett
(168) Muñoz, Anthony
(169) Murphy, Michael J.
(170) Nagornyy, Viktor
(171) Nelson, Connie B.
(172) Neubauer, Steven
(173) Norman, Jeanette M.
(174) Nydick, Barbara A.
(175) Oliver, Dale
(176) Pabian, David P.
(177) Paige, Jennifer
(178) Park, Carolie
(179) Petry, Marsha
(180) PlazinskI, Lori
(181) Price, Joel W.
(182) Purdon, Jeffrey R.
(183) R-Doe1
(184) R-Doe2
(185) Rapp, Robert C.
(186) Ready Jr., Robert F.
(187) Reeder, Gregory L.
(188) R-Doe3
(189) Ridder, Martin
(190) Riddering, Thomas K.

(191) Robinson, Susan P.
(192) Rodosovich, Ted
(193) Romanowski, Scott
(194) Rose, David
(195) Rosenthal, Neal
(196) Rothstein, Polly
(197) Saia, Chris
(198) Saltzman, Jonah
(199) Sanden, Mary
(200) S-Doe1
(201) Schaich, David
(202) Schlueter, Roger S.
(203) S-Doe2
(204) Sellnow, Paul
(205) S-Doe3
(206) Sierichs Jr., William C.
(207) Silverman, Sarah A.
(208) Silverman, Carl H.
(209) Sitzes, Charlie C.
(210) Skomer, Debra A.
(211) Smith, Nancy S.
(212) Smith, Mike
(213) Solomon, Steven L.
(214) S-Doe4
(215) Stauffer, M. Laura
(216) Stauffer, Ronald P.
(217) Steiner, John
(218) S-Doe5
(219) Stone, Martin M.
(220) Storey, Paul
(221) Straus, Marvin
(222) Stubbs, Eric M.
(223) Swales, Gregory F.
(224) Tanner, Victor

(225) T-Doe1
(226) T-Doe2
(227) T-Doe3
(228) Theris, Niko
(229) Thorlin III, John F.
(230) Tierney, Sean M.
(231) Tjaden, Paul J.
(232) Tracey, Teri L.
(233) T-Doe4
(234) Trezos, Thanos
(235) Tucker, George K.
(236) VanTussenbrook, Scott V.
(237) Viceroy, Andrew D.
(238) Vix, Damon P.
(239) V-Doe1
(240) V-Doe2
(241) Ward, Don C.
(242) W-Doe1Parent1
(243) Wayne, Frank R.
(244) W-Doe 2
(245) Westphal, Karla
(246) Weyers, Joseph D.
(247) W-Doe1Parent2
(248) Wittmann, Dustin
(249) York II, Earl D.
(250) Young, Andrew M.
(251) Zehrer, Terrence
(252) Zerba, George W.
(253) Zerba, Mary P.
(254) Ziolkowski, Steven
(255) Zumach, Henry H.

(b) Organizational Plaintiffs

(1) The American Humanist Association
(2) Freedom From Religion Foundation
(3) Military Association of Atheists & Freethinkers
(4) Minnesota Atheists
(5) Atheists for Human Rights
(6) Atheist Alliance International
(7) Atheists United
(8) New Orleans Secular Humanist Association
(9) University Of Washington Secular Student Union
(10) Seattle Atheists
(11) Atheists of Florida
(12) Central Minnesota Friends Free of Theism
(13) Humanist Society of Santa Barbara
(14) Freethinkers of Colorado Springs, Inc.
(15) Atheists of Broward County, FL, Inc.
(16) Humanists of Washington
(17) Pennsylvania Nonbelievers
(18) Freethought Society of Greater Philadelphia
(19) Boston Atheists

(2) Defendants

(1) Hon. John Roberts, Jr., Chief Justice of the United States
(2) Other Unnamed Oath Administrator(s)[2]
(3) Presidential Inaugural Committee ("PIC")
(4) Other PIC Defendants[2]
(5) Joint Congressional Committee On Inaugural Ceremonies ("JCCIC")
(6) Senator Dianne Feinstein, Chairperson, JCCIC
(7) Armed Forces Inaugural Committee ("AFIC")
(8) Major General Richard J. Rowe Jr., Chairperson, AFIC
(9) United States Secret Service ("USSS")[2]
(10) Mark Sullivan, Director, USSS[2]
(11) United States Marshals Service ("USMS")[2]
(12) John F. Clark, Director, USMS[2]
(13) Other Governmental "Roe" Defendants[2]
(14) Rev. Rick Warren
(15) Rev. Joe Lowery
(16) Other Unnamed Clergy[2]

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[2] These defendants were named in the First Amended Complaint ("FAC"). Inasmuch as the District Court dismissed the case before ruling on Plaintiffs' Motion for Leave to Submit First Amended Complaint, these defendants were never served. *See* App. 13-14 n.3.

CORPORATE DISCLOSURE STATEMENT

None of the Organizational Plaintiffs has a parent and no publicly held company own 10% or more of their stock. No member of any Organizational Plaintiff has issued shares or debt securities to the public.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

(1) Plaintiffs ii

(2) Defendants xi

CORPORATE DISCLOSURE STATEMENT xii

TABLE OF AUTHORITIES xvi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

RULING OF THE COURT OF APPEALS 4

REASONS FOR GRANTING THE PETITION 4

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT THAT EXISTS REGARDING THE REDRESSABILITY COMPONENT OF STANDING AS IT INVOLVES THE EXECUTIVE BRANCH 4

II. THE PANEL MAJORITY HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT APPEARS TO CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, ALTHOUGH THAT QUESTION HAS NOT BEEN, BUT SHOULD BE, DEFINITIVELY SETTLED BY THIS COURT 10

CONCLUSION 15

APPENDIX

TABLE OF APPENDICES ..... App. i

Appendix A Court of Appeals' Opinion filed May 7, 2010 ..... App. 1

Appendix B Court of Appeals' Order denying appellants' petition for panel rehearing filed June 29, 2010 ....App. 43

Appendix C – Court of Appeals' Order denying appellants' petition for rehearing *en banc* filed June 29, 2010 .....App. 45

Appendix D District Court's Dismissal Order filed March 12, 2009 .....App. 47

TABLE OF AUTHORITIES

Cases

Chamber of Commerce of the United States v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) 5

Clinton v. Jones, 520 U.S. 681 (1997) 14

Ex parte Levitt, 302 U.S. 633 (1937) 13

Franklin v. Massachusetts, 505 U.S. 788 (1992) 6, 12, 14

INS v. St. Cyr, 533 U.S. 289 (2001) 14

Japan Whaling Assoc. v. American Cetacean Soc., 478 U.S. 221 (1986) 10

Kilbourn v. Thompson, 103 U.S. 168 (1881) 13

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 11, 13

Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001) 5

Marbury v. Madison, 5 U.S. 137 (1803) 13, 15

Mississippi v. Johnson, 71 U.S. 475 (1866) 6

Newdow v. Roberts, 603 F.3d 1002 (D.C. Cir. 2010) 1

Raines v. Byrd, 521 U.S. 811 (1997) 10

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) 7

Swan v. Clinton, 100 F.3d 973 (D.C. Cir. 1996) 5, 6, 7

Talenti v. Clinton, 102 F.3d 573 (D.C. Cir. 1996) 6

United States v. Nixon, 418 U.S. 683 (1974) 14

Utah v. Evans, 536 U.S. 452 (2002) 14

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 453 U.S. 464 (1982) 10

Williams v. Fanning, 332 U.S. 490 (1947) 14

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 14

Constitutional Provisions

U.S. Const. amend. I 1

U.S. Const. art II, § 2 5

U.S. Const. art. III, § 2 ..... 1, 10

Statutes

5 U.S.C. §§ 500-504 (2006) 9

5 U.S.C. § 702 (2006) 9

5 U.S.C. § 7123 (2006) 9

7 U.S.C. § 1463 (2006) 9

9 U.S.C. § 590 (2006) 9

10 U.S.C. § 950 (2006) 8

12 U.S.C. § 2278 (2006) 8

14 U.S.C. § 13 (2006) 8

15 U.S.C. § 719 (2006) 8

22 U.S.C. § 1502 (2006) 9

24 U.S.C. § 81 (2006) 8

26 U.S.C. § 7428 (2006) 9

28 U.S.C. § 1254 (2006) 1

28 U.S.C. § 1331 (2006) 3

28 U.S.C. § 1343 (2006) 3

28 U.S.C. § 1346 (2006) 3

28 U.S.C. § 1391 (2006) 8

28 U.S.C. § 2201 (2006) 3

28 U.S.C. § 2202 (2006) 3

29 U.S.C. § 1612 (2006).....9

30 U.S.C. § 1276 (2006).....8

36 U.S.C. § 1202 (2006).....9

37 U.S.C. § 251 (2006).....8

42 U.S.C. § 423 (2006).....9

42 U.S.C. § 1973 (2006).....8

42 U.S.C. § 7607 (2006).....9

45 U.S.C. § 150 (2006).....9

45 U.S.C. § 719 (2006).....9

47 U.S.C. § 402 (2006).....9

49 U.S.C. § 386 (2006).....9

Other Authorities

Carl Tobias, *Forum: Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 Wis. L. Rev. 919 (1995) 8

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3rd ed. 2006) 10

John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375 (2006) 5

Louis Henkin, Symposium: *The Bicentennial Celebration of the Courts of the District of Columbia Circuit: Two Hundred Years Constitutional Confrontations in the D.C. Courts*, 90 Geo. L.J. 725 (2002) 7, 8

Patricia M. Wald, *Women of the Courts Symposium: Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. Tol. L. Rev. 979 (2005) 8

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is available at *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010). It is reprinted in the attached Appendix A at App. 1.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit filed its decision on May 7, 2010, and entered an order denying petitioners' motion for rehearing on June 29, 2010. By writ of certiorari, this Court has jurisdiction under 28 U.S.C. § 1254(1) (2006) to review a court of appeals decision.

CONSTITUTIONAL PROVISIONS INVOLVED

The merits issues in this case are based primarily on the First Amendment's Religion Clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). However, this Petition concerns only the Court of Appeals' ruling on standing, which stems from Article III, Section 2 of the Constitution of the United States ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... to Controversies to which the United States shall be a Party; ...").

STATEMENT OF THE CASE

This case involves a challenge to the infusion of (Christian) monotheism into the nation's Presidential inaugural ceremonies. Because the panel majority dismissed the case on standing grounds, however (and because Petitioners are only challenging that standing ruling here), there is no need to burden the Court with details of the merits issues. Suffice it to say that, every four years, the President[3] makes decisions as to how he[4] would like the inauguration to proceed, which individuals and entities (such as defendants named in this case) carry out.

Those individuals and entities can be placed into three categories. Only one individual falls into the first category at each inaugural: the person chosen by the President to administer the oath of office. As a matter of tradition, that individual has been the Chief Justice of the United States. Since 1932, each Chief Justice administering the Constitutionally-prescribed presidential oath of office has – with no lawful authority – altered it by appending the purely religious phrase "so help me God."

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[3] In actuality, it may be a sitting President or a President-elect who is in the position of responsibility. Although, theoretically, that distinction might have ramifications in terms of the merits issues, it has no bearing on the standing issue raised in this Petition. For that reason, only "President" will be used henceforth.

[4] Because the English language lacks an epicene third person singular pronoun and because, to date, only males have served as President, the masculine third person singular pronoun will be used in this Petition.

The second category is comprised of the clergy Defendants who are invited to offer prayers to God (i.e., invocations and benedictions) during the inaugural exercises.

Lastly, there are those individuals and entities entrusted with the logistics in terms of putting the President's desires into effect. In other words, these defendants—listed in numbers (3)-(13) at page xi, *supra*—are like the "sound technician" alluded to in the panel majority's opinion, App. 18, who is responsible for "turning the ... microphone on." *Id.*[5]

With their claims arising under the Constitution of the United States, Petitioners filed this lawsuit pursuant to 28 U.S.C. § 1331. Jurisdiction was also felt to arise under 28 U.S.C. § 1346(a)(2). In their attempt to prevent Defendants from bringing to fruition what they believe are unconstitutional infusions of (Christian) monotheism into the nation's Presidential inaugural ceremonies, Petitioners sought declaratory relief pursuant to 28 U.S.C. § 2201(a) and § 2202, and injunctive relief pursuant to 28 U.S.C. §§ 1343(a)(3) and (a)(4).

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[5] Perhaps if the panel majority employed an analogy involving a harm that was sensed more acutely by the judges, the opinion's flaws would have been recognized. Surely redressability would exist if an usher, following the President's orders, attempted to keep all Atheists (or all Jews, or all whites, or all blacks) out of the first five hundred rows of seats.

RULING OF THE COURT OF APPEALS

In a split decision, the Court of Appeals held that Petitioners lacked standing, giving three reasons for reaching this conclusion.[6] It is only the third reason, with its frightening potential to immunize from judicial review an extraordinary array of executive branch actions, which Petitioners seek to have reviewed.

According to the panel majority, Petitioners' claims were not redressable because "[a] President could simply find other willing assistants not subject to the injunction to carry out his wishes." App. 19. As a result, "declaratory and injunctive relief against the defendants actually named would not prevent the claimed injury." App. 17.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT THAT EXISTS REGARDING THE REDRESSABILITY COMPONENT OF STANDING AS IT INVOLVES THE EXECUTIVE BRANCH.

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[6] The panel majority first found that Petitioners' challenge to the 2009 inauguration is moot because they "failed to appeal the district court's denial of their preliminary injunction motion." App. 12. It also found that Petitioners' request for relief against unnamed future defendants cannot be granted since "a court will not entertain a suit unless the defendant has been made a party by service of process." App. 16.

Prior to the opinion in the instant action, redressability in the District of Columbia Circuit (as it pertains to executive branch actions) was in accord with the instructions of this Court. *See e.g.*, *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("That the 'executive's' action here is essentially that of the President does not insulate the entire executive branch from judicial review."); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("[T]he bedrock principle [is] that our system of government is founded on the rule of law, and it is sometimes a necessary function of the judiciary to determine if the executive branch is abiding by the terms of [the law]."). The panel majority, however, has essentially reversed this approach.

In the other circuits, there appears to be a dearth of cases dealing with this issue. Perhaps this is because of "the D. C. Circuit's unique character, as a court with special responsibility to review legal challenges to the conduct of the national government." John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 389 (2006). In fact, Petitioners have found only one on-point case, decided by the Eleventh Circuit nearly a decade ago. In *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1310-11 (11th Cir. 2001), the constitutionality of the North American Free Trade Agreement ("NAFTA") (which President Clinton signed into law without abiding by the requirements of the Constitution's Article II, Section 2 "Treaty Clause") was challenged. Standing was at issue in that case,

with special attention paid to redressability vis-à-vis executive branch actions. Citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992), *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), and *Mississippi v. Johnson*, 71 U.S. 475 (1866), the Eleventh Circuit noted, "we believe that even short of directly ordering the President to terminate our nation's participation in NAFTA, a judicial order instructing subordinate executive officials to cease their compliance with its provisions would suffice for standing purposes."

In contrast to the rarity of this question arising in the other circuits, the D.C. Circuit appears to encounter it relatively frequently. Never before, however, has the Circuit concluded (as the panel majority did here) that redressability is lacking because the President can simply replace those whom a court enjoins with other subordinates (who would then do what that court had deemed unconstitutional). To be sure, redressability may not exist for other reasons. In *Talenti v. Clinton*, 102 F.3d 573 (D.C. Cir. 1996), for example, the Circuit ruled that, since the President was specifically authorized, by statute, to act in a manner that would not have provided the plaintiffs with their desired relief, there was no redressability. The Circuit did not, however, even remotely suggest that declaratory or injunctive relief against lower level executive branch officials was unavailing because the President could simply find others to disregard the judicial mandate.

Swan v. Clinton, *supra*, was another D.C. Circuit case dealing with redressability in regard to the executive branch, with the issue involving an action of the President himself. The panel there expressly noted that "any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials." *Id.* at 978. This followed the same approach seen in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971): "[C]ourts have power to compel subordinate executive officials to disobey illegal Presidential commands." *Id.* at 1072 n.12.

Obviously, the holding in the instant case is completely contrary to the holdings in the cases just mentioned. The argument that a President can deal with declaratory and/or injunctive relief against subordinate officials by "find[ing] other willing assistants not subject to the injunction to carry out his wishes," App. 18, could have been made before. Yet, until the instant case, that claim was never even alluded to, despite myriad on-point situations.

With "[t]he Court of Appeals for the District of Columbia Circuit ha[ving] been acclaimed as the second most important court in the country," Louis Henkin, *Symposium: The Bicentennial Celebration of the Courts of the District of Columbia Circuit: Two Hundred Years of Constitutional Confrontations in the D.C. Courts*, 90 Geo. L.J. 725,

725 (2002),[7] it is essential that this critical error in the case at bar be remedied. After all, "Washington, D.C. is the political center of the country," Carl Tobias, *Forum: Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 Wis. L. Rev. 919, 925 (1995), and the D.C. Circuit's physical and legal connection with the nation's capital inevitably guides the rest of the country (in a manner second only to this Court) in the appropriate relationship between the judiciary and the executive branch.

Moreover, due to the venue provisions of 28 U.S.C. § 1391(b) (2006), cases against the President and his subordinates often end up being heard by the D.C. Circuit. Similarly, many statutes grant jurisdiction exclusively to the D.C. Circuit's courts, thus placing the actions of many executive branch agencies under its auspices as well. *See, e.g.*, 10 U.S.C. § 950g (2006) (military commissions); 12 U.S.C. § 2278a-3(b) (2006) (Farm Credit System Assistance Board); 14 U.S.C. § 13 (2006) (Federal Aviation Administration Civil Penalty Actions); 15 U.S.C. § 719h (2006) (Alaska Natural Gas Transportation Act); 24 U.S.C. § 81 (2006) (Housing and Urban Development Review of Actions); 30 U.S.C. § 1276 (2006) (Abandoned Mine Land Reclamation Program); 37 U.S.C. § 251 (2006) (Patents, Trademarks, and Copyrights Arbitration Royalty Panels); 42 U.S.C. 1973c (2006) (Voting

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[7] *See also* Patricia M. Wald, *Women of the Courts Symposium: Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. Tol. L. Rev. 979, 987 (2005).

Rights Act); 42 U.S.C. § 7607 (2006) (Clean Air Act); 45 U.S.C. § 719 (2006) (United States Railway Association); 47 U.S.C. § 402 (2006) (appeals from orders of Federal Communications Commission).

Additionally, the D.C. Circuit often has concurrent jurisdiction. *See, e.g.*, 5 U.S.C. § 7123 (2006) (decisions of the Federal Labor Relations Authority); 7 U.S.C. § 1463 (2006) (Agriculture Tobacco Transition Assessments); 9 U.S.C. § 590 (2006) (Egg Products Inspection Act); 22 U.S.C. § 1502 (2006) (Foreign Relations Records); 26 U.S.C. § 7428 (2006) (Internal Revenue Service 501(c)(3) declarations); 29 U.S.C. § 1612 (2006) (Labor Sunshine Act Regulations); 36 U.S.C. § 1202 (2006) (Parks, Forests, and Public Property Request to Amend Records); 42 U.S.C. § 423 (2006) (Public Health Medicare Prescription Drug Benefits); 45 U.S.C. § 150 (2006) (CMS Enforcement in Group and Individual Insurance Markets); 49 U.S.C. § 386 (2006) (Transportation proceedings).

These provisions place numerous executive branch agencies within the D.C. Circuit's jurisdiction. Under the panel majority's theory, that jurisdiction would be largely sapped of consequence, since the President could appoint other subordinate officials and have them ignore the judiciary's conclusions. In fact, it would appear that the provisions of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500-504 (2006), would be voided to a great degree. To be sure, the right of judicial review under the APA is granted by statute. 5 U.S.C. § 702 (2006). However, "Congress cannot

erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). As this Court's current case law indicates, those requirements—including the requirement of redressability—are met, even when presidential acts are involved. *See, e.g., Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221 (1986) (finding that standing existed under the APA, even when the Secretary of Commerce (an executive branch official) is clearly effectuating the policy choices of the President).

II. THE PANEL MAJORITY HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT APPEARS TO CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, ALTHOUGH THAT QUESTION HAS NOT BEEN, BUT SHOULD BE, DEFINITIVELY SETTLED BY THIS COURT.

"[T]he concept of 'Art. III standing' has not been defined with complete consistency." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 453 U.S. 464, 475 (1982). In fact, "[s]tanding frequently has been identified by both justices and commentators as one of the most confused areas of the law,"[8] often with "seeming incoherence."[9] By accepting this case, the Court will be able to help remedy this confusion in a

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[8] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3rd ed. 2006) at 60.

[9] *Id.*

focused manner, by limiting the discussion to one, well-circumscribed standing issue: redressability in the particular context of executive branch actions. On this issue, a consensus among the justices is quite likely, which will provide the lower courts with much needed guidance.

That the lower courts need this guidance is perhaps best seen by considering the case with which the panel majority began its standing analysis: *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Although five justices joined Justice Scalia in the main portions of that seminal standing opinion, only three justices joined him in his redressability ruling.

Two weeks later the Court decided another case where redressability—this time specifically against the President—was considered. Again, there was a consensus of only four justices in regard to that standing component:

> [W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Franklin v. Massachusetts, 505 U.S. 788, 803 (1992). Although the panel majority here argued that "that portion of the opinion did not garner the support of a majority of the Supreme Court and is therefore not controlling on this court," App. 21, the fact is that only one justice voiced any disagreement about standing, and that justice specifically noted:

> Although only a plurality of the Court joins that portion of JUSTICE O'CONNOR's opinion which finds standing (Part III), I must conclude that the Court finds standing since eight Justices join Part IV of the Court's opinion discussing the merits of appellees' constitutional claims.

505 U.S. at 824 n.1 (Scalia, J., concurring in part and concurring in the judgment). Moreover, Justice Scalia's entire six page concurrence was spent on "recogniz[ing] that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers." *Id.* at 826. "Review of the legality of Presidential action," he continued, "can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Id.* at 828.

Thus, the panel majority has set as D.C. Circuit precedent an important redressability policy that appears to have this Court's standing jurisprudence completely backward. At least five—and perhaps all nine—of the 1992 justices would have found

redressability in the circumstances found in this case. Accordingly, the panel majority's "invitation of executive lawlessness," *Lujan*, 504 U.S. at 601 (Blackmun, J., dissenting), ought to be reversed.

The idea that redressability exists when the President's actions abrogate fundamental rights is not a novel wrinkle in this Court's jurisprudence. Since Chief Justice Marshall famously wrote that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right," *Marbury v. Madison*, 5 U.S. 137, 163 (1803), judicial review of presidential decision-making has been recognized. Thus, in *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881) the Court wrote:

> [L]iving under a written constitution, ... it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government ... have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

Throughout the twentieth century, as well, this view has been steadfastly maintained. *See, e.g.*, *Ex parte Levitt*, 302 U.S. 633 (1937) (noting that "a private individual [may] invoke the judicial power to

determine the validity of executive or legislative action"); *Williams v. Fanning*, 332 U.S. 490, 494 (1947) (finding the existence of redressability "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (issuing a declaratory judgment (and upholding the District Court's preliminary injunction) that the President violated the constitution by seizing private steel mills). Thus, when examined in the federal courts, "exercises of power by the Executive Branch ... have been found invalid as in conflict with the Constitution." *United States v. Nixon*, 418 U.S. 683, 703 (1974). As the Court succinctly stated, "we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

No diminution of this redressability approach has taken place since the millennium, either. Although the context of habeas relief is substantially different from the request for religious neutrality that forms the gravamen of the complaint here, "the historical use of habeas corpus to remedy unlawful executive action," *INS v. St. Cyr*, 533 U.S. 289, 303 (2001), is founded on the same principles. Those principles were reinforced once more in *Utah v. Evans*, 536 U.S. 452, 460 (2002) (citing *Franklin* with approval).

In short, for more than two hundred years, the Court has assured plaintiffs that the government of the United States will remain "emphatically ... a government of laws, and not of men." *Marbury*, 5 U.S. at 163. The panel majority's abrogation of that commitment must not be permitted to become precedential case law in the D.C. Circuit.

CONCLUSION

The panel majority's redressability ruling is contrary to prior D.C. Circuit precedent and has resulted in a circuit split. It also is contrary to more than two centuries of Supreme Court case law. Most importantly, it has the potential to result in severe abuses of citizens throughout the nation. Petitioners, therefore, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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